82-56

Docket No.

Office - Supreme Court, U.S.
FILED
NOV 5 1982
ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

v.

SEA-LAND SERVICES, INC.,
Respondent

MOTION TO RECONSIDER DENIAL OF PETITION FOR CERTIORARI

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John H. Klein
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SEE INSIDE COVER FOR ADDITIONAL CASES

Docket No.

In the Supreme Court of the United States

MELVIN BANDY, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Petitioners,

v.

BANK LINE, LTD.,
Respondent.

FRED L. SPRATLEY, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

HELLENIC LINES, LTD.,
Respondent.

THOMAS E. McLEAN, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

CIA TRANSATLANTIC ESPANOLA, S.A.,
Respondent.

CHARLES A. CALDWELL, and
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

OGDEN SEA TRANSPORT, INC.,
Respondent.

Docket No.

In the Supreme Court of the United States

WALLACE CURRY, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Respondent.

WILBERT C. HAROLD, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
THE HARTFORD ACCIDENT INDEMNITY INSURANCE COMPANY,
Petitioners,

v.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Respondent.

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IN THE
SUPREME COURT OF THE
UNITED STATES

Pearlie Simmons,
Petitioner
v.
Sea-Land Services, Inc.,
Respondent.

Melvin Bandy, for and on behalf of
himself, individually, and
American Mutual Insurance Company of
Boston,
Petitioners,
v.
Bank Line, Ltd.,
Respondent.

Fred L. Spratley, for and on behalf of
himself, individually, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
Hellenic Lines, Ltd.,
Respondent.

Thomas E. McLean, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
CIA Transatlantic Espanola, S.A.,
Respondent.

Charles A. Caldwell, and
Commercial Union Insurance Company,
Petitioners,
v.
Ogden Sea Transport Inc.,
Respondent.

Wallace Curry, and
Atlantic and Gulf Stevedores, Inc.,
Petitioners
v.
Compania Crasatlantica Espanola, S.A.,
Respondent.

Wilbert C. Harold, for and on behalf of
himself, individually, and
The Hartford Accident Indemnity
Insurance Company,
Petitioners,
v.
Companhia De Navegacao Maritima Netumar,
Respondent.

MOTION TO RECONSIDER DENIAL
OF PETITION FOR CERTIORARI

Petitioners move the Court pursuant to Rule 58 of the Rules of the Supreme Court of the United States to rehear the petition for certiorari to the United States Court of Appeals for the Fourth Circuit previously filed in this matter. This Court in an order dated October 12, 1982 denied certiorari, with a dissent by Justice White, with whom Justice O'Connor joined.

The petition for certiorari sought review by this Court of the Court of Appeals for the Fourth Circuit's decision that acceptance of the first payment of workmen's compensation by a longshoreman constituted "acceptance of compensation under an award in a compensation order" so as to trigger the six month period within which a longshoreman could sue a shipowner. The petition for certiorari pointed out the difference between that holding by the Fourth Circuit and the holding of the Court of Appeals for the Second Circuit which held that the six month period within which a longshoreman must sue a third party begins only when the total amount of compensation benefits to be received by the injured worker is fixed, either by order, stipulation of the parties, or informal award. Verderame v. Torm Lines, 670 F.2d 5, (2d Cir.

1982); D'Amico v. Compania de Nav. Mar. Netumar, 677 F.2d 249 (2d Cir. 1982).

In addition, petitioners filed a supplement to the petition for certiorari which consisted of the decision of the Court of Appeals for the Sixth Circuit in Duris v. Erato Shipping Inc., 684 F.2d 352 (6th Cir. dec. July 16, 1982). In Duris, the court explicitly held that "the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)." Id. at 355. Thus, at the time of this Court's decision on the petition for certiorari filed herein, there were in fact three separate Courts of Appeals decision, which significantly differed in determining when a longshoreman could sue a third party shipowner.

A petition for certiorari was filed with this Court in Duris sub nom.

Pallas Shipping Agency v. Duris, No. 82-502, on September 20, 1982, 51 U.S.L.W. 3260. As of the date of this petition for rehearing, no decision has yet been made by this Court on the Duris petition for certiorari.

The filing of the petition for certiorari in Duris is an intervening circumstance of substantial effect. Both Duris and the instant petition seek to have this Court determine whether mere receipt of workmen's compensation benefits by a longshoreman is sufficient to trigger the statutory assignment provision of 33 U.S.C. §933(b). This is an important question of maritime law which should be resolved by this Court. The decisions of the Sixth and Second Circuits are distinctly contrary to the decision of the Fourth Circuit. This Court should resolve the question by establishing a uniform national

interpretation of the Longshoremen's Act.

Congress clearly intended the Longshoremen's Act to be applied uniformly throughout the country. The Senate Report which accompanied the 1972 Amendments to the Longshoremen's Act states:

> "Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law." S. Rep. 92-1125, 92d Cong., 2d Sess.

The several petitioners here, longshoremen injured working on board ships, are barred from recovering damages from the shipowners. Petitioners here would be entitled to sue under the Sixth Circuit's holding in

Duris and under the Second Circuit's holding in Verderame and D'Amico. Since this Court may well decide to review the Duris decision, this Court should retain the instant petition on its docket so the appropriate uniform and national standard can be applied to the instant petitioners as well.

In addition two state appellate courts have rendered decisions which reject the holding of the Fourth Circuit sought to be reviewed herein. The text of these two decisions is attached hereto as an Appendix. These two decisions were not called to this Court's attention previously, for they were published subsequent to the petition for certiorari. In Grey v. Rederi A/S Myren, dec. July 1, 1982, the New York Appellate Division, First Department specifically rejected the

Simmons holding and adhered to the Second Circuit's Verderame holding.

More importantly, in Spoto v. Washington Metropolitan Area Transit Authority, No. 1265, dec. Sept. 8, 1982, the Court of Special Appeals of Maryland held that "mere acceptance of compensation, absent an award, does not effect a statutory assignment of the injured party's claim." Thus a state court of appeals within the Fourth Circuit geographic area has reached a decision directly contrary to the Fourth Circuit's decision in Simmons. This means longshoremen suing in Maryland state courts are able to bring suits which longshoremen suing in federal courts in the Fourth Circuit are barred from bringing. Longshoremen suing in Baltimore, Maryland in federal courts have different more restricted rights than longshoremen suing in Baltimore,

Maryland state courts. This is clearly not in accordance with the expressed Congressional intent that there be a uniform application of the Longshoremen's Act.

Additionally, longshoremen in Norfolk, Virginia may also face this anomalous situation. Longshoremen suing in federal courts in Norfolk are governed by the Fourth Circuit's Simmons holding that any acceptance of compensation benefits starts the six month period. However, the Virginia Supreme Court has accepted for review the question of whether receipt of compensation benefits under the Longshoremen's Act without entry of a formal award in a compensation order filed by the Deputy Commissioner serves to trigger the assignment provision. Ridley v. American Export Lines, Rec. No. 801959 (appeal awarded Sept. 15,

1981). It is clearly inappropriate for longshoremen to have one period within which to sue in state courts and another lesser period within which to sue in the federal courts, all based upon the same statute. Yet that is the precise result in Maryland and it may well be the result in Virginia.

Longshoremen now also have different rights in federal courts depending upon the geographic area within which they are injured. Longshoremen injured in the Great Lakes (Six Circuit) and the North Atlantic (Second Circuit) are able to bring suits against shipowners which longshoremen injured in the mid-Atlantic (Fourth Circuit) are unable to bring. Such differing results in application of the same federal statute are clearly inappropriate. The situation cries out for this Court to exercise its review

authority and to create and apply a uniform interpretation of the Longshoremen's Act.

CONCLUSION

Because there have been substantial intervening circumstances--the Sixth Circuit's Duris decision, the filing of a petition for certiorari in Duris, the Maryland State Court decision contrary to the Fourth Circuit's Simmons holding, and the New York State Court decision specifically rejecting Simmons and adhering to the Second Circuit's Verderame decision--petitioners pray this Honorable Court to reconsider is decision to deny certiorari herein, to consider the petition filed herein in conjunction with that filed in Duris,

and to grant certiorari to review the Fourth Circuit's Simmons decision.

Respectfully submitted,

By
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Counsel for Petitioners.

CERTIFICATE OF SERVICE

I John H. Klein certify that on or before November 5, 1982, 40 copies of this Petition for Certiorari were mailed or delivered to the Clerk, United States Supreme Court and three copies were mailed to:

John B. King, Jr., counsel for Ogden Sea Transport, Inc., Companhia de Navegacao Maritima Netumar, Compania Crasatlantica Espanola, S.A, 2050 Virginia National Bank Bldg., One Commercial Place, Norfolk, Virginia 23510;

Carter B.S. Furr, counsel for Nakliyati, Hellenic Lines, Ltd., P.O. Box 1039, Norfolk, VA 23501;

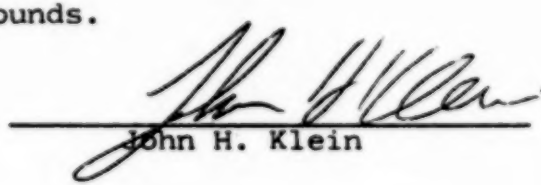
John R. Crumpler, Jr., counsel for Bank Line and Sea-Land Services, P.O. Box 119, Norfolk, VA 23501.

and Mr. Ralph Rabinowitz, counsel for Pearlie Simmons, P.O. Box 332, Nofolk, VA 23514.

John H. Klein

CERTIFICATE

I John H. Klein counsel for petitioners certify that the petition for rehearing filed herein is presented in good faith and based upon intervening circumstances of substantial effect. I certify that the petition is limited to those grounds.



John H. Klein

APPENDIX

WAVERLY GRAY, Plaintiff-respondent, v. REDERI A/S MYREN, Defendant-appellant.

Decided July 1, 1982 Before Murphy, P.J.; Kupferman, Sandler, Carro and Markewich, JJ.

Appeal by the defendant-appellant from so much of an order of the Supreme Court, New York County (Wallach, J), entered on September 26, 1980 as denied defendant's motion for summary judgment.

John M. Toriello, of counsel (Thomas F. Molanphy with him on the brief; Haight, Gardner, Poor & Havens, attorneys) for the defendant-appellant.

Howard Fishkin, of counsel (Zimmerman & Zimmerman, attorneys) for the plaintiff-respondent.

Markewich, J. - Plaintiff was employed as a longshoreman by International Terminal Operating Co., Inc. While assisting in ITO's stevedoring operations on board defendant's vessel, he sustained injuries to his right arm and left leg

on November 30, 1972. Pursuant to the Longshoremen's & Harbor Workers' Compensation Act (33 U.S.C. sec. 901, et seq.), plaintiff filed a Worker's Compensation claim with the United States Department of Labor. ITO did not controvert the claim; rather, it paid compensation, without an award, from Dec. 1, 1972 through Dec. 18, 1972. At plaintiff's request, the Labor Department conducted a conference to consider the claim for additional compensation for temporary total disability through March 26, 1973. This resulted in a "Memorandum of Informal Conference" dated May 8, 1973, which directed payment of temporary total disability from Dec. 1, 1972 through March 25, 1973. On May 18, 1973, ITO paid this award. Plaintiff then presented a second claim in which he sought compensation for permanent

partial disability. On May 6, 1974, the Labor Department issued a document awarding plaintiff $2,951.26 based upon its finding that he had a 2½ percent permanent partial disability of the right arm and a 5 percent permanent partial disability of the right leg. ITO duly paid this additional award.

This personal injury action against the vessel's owner was commenced on April 11, 1974, one month before the May 6, 1974 award for permanent partial disability and thirteen months after the May 8, 1973 award for temporary total disability. Relying upon 33 United States Code, section 933(b), which requires that an action against a third person must be commenced within six months after acceptance of a compensation award, defendant moved for leave to serve an amended answer and for summary judgment hereon on the ground

that six months had elapsed since plaintiff's acceptance of the May 8, 1973 award. Judge Wallach granted leave to amend the answer but denied summary judgment since the May 6, 1973 award of additional compensation implied that the recommendation in the May 8, 1973 memorandum was interim in nature, so that the six-month statute of limitations had not begun to run from the date of the first award.

Defendant's appeal from denial of summary judgment raises the question of whether the May 8, 1973 memorandum awarding temporary total disability constitutes an "award in a compensation order" so as to start the running of the six-month limitation contained in section 933(b). Although plaintiff has not cross-appealed that part of the order which granted defendant leave to amend its answer, our search of the

record reveals that there was no merit to the proposed defense. Leave to amend should therefore not have been granted (CPLR 3212[b]; Siegel, New York Practice sec. 282, page 339.)

Section 905(b) of the Act authorizes an injured person to bring an action against the vessel owner as a third party. That right is circumscribed by Section 933:

"(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation under an award in a

compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." [Emphasis added]

The award rendered in the May 8, 1973 memorandum was for the sole purpose of compensating plaintiff for his temporary total disability. That was the only issue addressed at the informal conference. Such an interim payment does not start the time period running under the Act. "The legislative history of the statute, as outlined by the Supreme Court and ourselves in Rodriguez,[1] makes clear that Congress's

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[1] Rodriguez v. Compass Shipping Co., Ltd., 617 F.2d 255 (2d Circuit 1980) affirmed, - U.S.-, 101 S.Ct. 1945, 68 L.Ed.2d 472

purpose was to provide the injured longshoreman, after he knows what his award of compensation benefits will be, with a period of six months within which to decide whether in light of all of the circumstances, including the settlement arrived at with the employer without proof of any fault, to bring an action against a third party seeking damages based on its negligence." (Verderame v. Torm Line, A/S, 670 F.2d 5, 6-7 [2d Circuit 1982]). Plaintiff longshoreman could not possibly appraise the full nature and extent of his injuries until he knew that total amount of compensation he would ultimately receive from his employer; he did not gain this knowledge until May 6, 1974, the date the Labor Department issued its additional award for permanent partial disability, which supplemented and completed the first award covering

temporary total disability. "To hold otherwise would be to force the longshoreman to proceed in the dark." (Id. at page 7.) the mere fact that plaintiff accepted payment under the May 8, 1973 memorandum cannot serve to transform the interim award into "an award in a compensation order" sufficient to trigger the six-month period set forth in section 933(b)

We note that the Fourth Circuit has determined that "the focus [of an award] should properly be upon some act of ratification of compensation, whether formal or informal, and the subsequent acceptance of compensation by the claimant." (Liberty Mutual Insurance Co. v. Ameta & Company, 564 F.2d 1097, 1102.) That circuit has also ruled that an award in a compensation order is created by the completion of three events: "(1) the employer, having not

contravened its liability, initiated compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and 93) the longshoreman accepts any of the payments." (Simmons v. Sealand Services, Inc., Docket No. 81-1808.) Such an interpretation of the rights provided an injured longshoreman who is covered under the Act runs counter to the very policy and purpose of the Act since it would force an injured worker to institute this third-party personal injury action within six months of acceptance of any payment, no matter how small, and despite the fact that only a minimal portion of the injuries may be covered under that award. We adopt the Second Circuit's interpretation in Verderame, consistent as it is with the United States Supreme

Court's decision in Rodriguez. The Fourth Circuit's concern with undue delay of an employee in seeking access to relief gives disproportionate weight to a comparatively brief period. The act has its own built-in safeguards; it is unnecessary for the courts to go further in order to protect vessel owners and employers at the expense of injured longshoremen.

Plaintiff having commenced this action within six months of the May 6, 1974 award when he was first advised of the full nature and extent of his injuries and the amount of compensation he would receive therefor, this action cannot be barred by the statute of limitations. Accordingly, leave to amend the answer should not have been granted, the defense contained therein being insufficient as a matter of law.

The order, Supreme Court, New York County (Wallach, J.), entered Sept. 26, 1980, should be modified, on the law and the facts in the exercise of discretion, to the extent of denying the motion for leave to serve and file an amended answer, and otherwise affirmed, without costs and without disbursements.

All concur.

Reported In the Court of Special Appeals of Maryland, No. 1265, September Term, 1981.

Nelson Spoto, et al., v. Washington Metropolitan Area Transit Authority, et al.,
Opinion by Moore, J., Filed September 8, 1982.

The question presented here is whether the Circuit Court for Prince George's County (Femia, J.) correctly granted summary judgment for the appellee-defendant in a personal injury suit on the ground that a federal six-month period of limitations applied, and not Maryland's three-year statute. We find error and vacate the judgment.

I.

Nelson Spoto, an architect, was injured on January 14, 1976, while working for an architectural firm on a Metro site in Prince George's County. The employer's insurer, Continental Casualty Company (CNA) paid him workers'

compensation benefits between February 1976 and December 1977.

On January 11, 1979, three days before the three-year statute of limitations expired, Mr. Spoto filed a negligence action against Washington Metropolitan Ara Transit Authority (WMATA) and others. The suit represented the personal claims as well as the subrogated interest of CNA.

On the day of trial, the defendants moved for summary judgment contending that Spoto was barred by a six-month limitations period contained in the Longshoremen's and Harbor Workers' Act[1] 33 U.S.C. §933(b) (1976 ed.), which reads as follows:

> "Acceptance of such [workers'] compensation under an award in

[1]Mr. Spoto's claim for compensation was brought pursuant to §36-501, et seq., of the District of Columbia Code. By making such a claim, he became subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act which has been made applicable to the District of Columbia.

a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." (Emphasis added.)

II

The motion of WMATA for summary judgment was made orally in open court, when the case was called for trial. Counsel for WMATA informed the court that "rather than go through lengthy introduction of exhibits" in support of the motion, he could establish his case "in two minutes through the plaintiff, Mr. Spoto."

The only relevant facts adduced in Mr. Spoto's very brief appearance on the witness stand were (a) that CNA paid him a total of "nine thousand some dollars," beginning approximately one month after

the accident and (b) that Mr. Spoto accepted the payments.

As we note from the simple, direct language of §339b) quoted above, it was incumbent upon the defendants to show more than the payment and acceptance of workers' compensation payments. Only acceptance of such compensation

- under an award
- in a compensation order
- filed by the Deputy Commissioner or [Benefits Retirement] Board

triggers an assignment to the employer, unless the person entitled to compensation commences an action "within six months after such award. (Emphasis added.)

The record below is bereft of facts pertaining to an award. This was appellees' burden. They failed to sustain it and were not entitled to summary judgment. The lower court erred

in its conclusion that acceptance of compensation paid by CNA triggered an assignment and the operation of the short statute of limitations. The case of Rodriguez v. Compass Shipping Co., 451 U.S. 596, 101 S.Ct. 1945 (1981), upon which the defendants and the court relied, does not support such a conclusion; and it is at variance with the meaning of §33(b) as shown by the legislative history of the section as set out in Rodriguez.

In Rodriguez the Court assumed for the purposes of the decision that the plaintiff had "accepted compensation from his employer pursuant to an award in a compensation order." Id. at 1948, n.3. Indeed, at n.16, id. at 1951, the House Report makes clear that there is a significant difference between "acceptance of compensation and "acceptance of...compensation under an

award in compensation." The Court noted that, prior to 1938, acceptance of compensation, without more, operated as an assignment. 44 Stat. 1424, 1440 (1927); but by an amendment in 1938 the employee was relieved of the risk of having a mere acceptance of compensation operate as an immediate assignment of his cause of action against a third party, 52 Stat. 1164, 1162[2]. Id. The 1938 procedural change, the Court stated, id. at 1951, was "designed to protect the employee from the harsh consequences of an improvident election."[3]

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[2]In 1959, §33(b) was amended to its present form, affording the employee a six-month period, after receiving a statutory compensation award, within which to sue the third party and prevent an assignment.

[3]The court quotes extensively from the House Committee Report on the 1938 amendment concerning the purpose of the measure, i.e., to "remove possible cause of complaint" that mere acceptance of compensation effect an assignment to the employer. Rodriguez v. Compass Shipping

We think it is clear that mere acceptance of compensation, absent an award, does not effect a statutory assignment of the injured party's claim unless suit is filed in six months. Neither the undisputed facts nor the applicable law supported the grant of summary judgment in this case. See Theodore v. Moore McCormack Lines, Inc., 516 F.Supp. 25 (S.D.N.Y. 1981); Dunbar v. Retla Steamship Co., 484 F.Supp. 1308 (E.D. Pa. 1980).

JUDGMENT VACATED; CASE REMANDED FOR TRIAL: APPELLEES TO PAY THE COSTS.

Co., 451 U.S. 596, 101 S.Ct. 1945, 1951 (1981).